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No. 73-97

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

AGUSTIN MARRERO DE IBERN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Agustin Marrero DeIbern, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 21, 1973. A timely petition for rehearing was filed and denied on June 11, 1973.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears as Appendix A. The opinion of the United States District Court, unreported, appears as Appendix B. The order denying the petition for rehearing appears as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 21, 1973. A timely petition for rehearing was filed and denied by order of Court on June 11, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In April, 1972, a Federal Grand Jury returned an indictment against the petitioner, a practicing attorney in Lake County, Indiana, charging him with false personation of a diplomatic official and in such pretended character attempting to secure immunity from prosecution for the offenses of driving under the influence of intoxicating liquor and speeding in the City Court of Portage, Indiana, in violation of Title 18 U.S.C. Sec. 915.

The evidence was uncontroverted that the petitioner had been appointed a Consul by the Domnican Republic, in 1966, and the appointment had never been revoked. The petitioner had applied for an exequatur which our State Department had denied by virtue of the fact that the petitioner, at the time of his application, was an employee of the State of Indiana. The denial of the exequatur constituted a lack of accreditation. The question thus presented is: Does the denial of the exequatur render his personation as a Consul false within the meaning of 18 U.S.C. 915?

STATUTES INVOLVED

18 U.S.C. 915 provides as follows:

> "Whoever with intent to defraud within the United States falsely assumes or pretends to be a diplomatic consular or other official of a foreign government duly accredited as such to the United States and acts as such or in such pretended character demands or obtains or attempts to obtain any money, paper, document or other thing of value shall be fined not more than $5000 or imprisoned not more than ten (10) years, or both."

TREATY INVOLVED

Treaty entitled "Vienna Convention on Consular Relations and Optional Protocol on Disputes". Done at Vienna April 24, 1963. Ratification advised by the Senate of the United States of America on October 22, 1969. Ratified by the President of the United States of America November 12, 1969. Ratification of the United States of America deposited with the Secretary General of the United Nations November 24, 1969. Proclaimed by the President of the United States of America January 29, 1970. Entered into force with respect to the United States of America December 24, 1969.

Found on Page 16 in the English version contained in Treaties in International Acts and Series No. 6820 Article XXIII Persons Declared Non Grata. Article XXIII reads as follows:

1.

> The receiving State may at any time notify the sending State that a consular officer is persona non grata or that any other member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consular post.

2.

If the sending State refuses or fails within a reasonable time to carry out its obligations under Paragraph 1 of this Article, the receiving State may, as the case may be, either withdraw the exequatur from the person concerned or ceases to consider him as a member of the consular staff.

3.

A person appointed as a member of the consular post may be declared unacceptable before arriving in the territory of the receiving State or, if already in the receiving State, before entering on his duties with the consular post. In any case, the sending State shall withdraw his appointment.

4.

In the cases mentioned in Paragraphs 1 and 3 of this Article, the receiving State is not obliged to give to the sending State reasons for its decision.

STATEMENT OF FACTS

Petitioner was charged with and convicted of violation of 18 U.S.C. 915, false personation of a diplomatic official. The cause was submitted for trial on June 21, 1972, without the intervention of a jury, the petitioner having filed a waiver of jury trial. On August 11, 1972, the Court entered final judgment of conviction. Imposition of sentence was withheld and the petitioner was placed on probation for a period of two (2) years.

The substance of the indictment charged the petitioner with intending to defraud the City Court of Portage, Indiana, by falsely assuming and pretending to be a diplomatic official of the Dominican Republic duly accredited as

such to the United States in order to obtain immunity from prosecution for the offenses of driving under the influence of intoxicating liquor and speeding and that, in such false, assumed and pretended character, he did obtain immunity from prosecution.

The petitioner, a practicing attorney in Lake County, Indiana, was arrested by a Police Officer of the City of Portage, Indiana, on December 23, 1971, charged with speeding and driving under the influence of intoxicating liquor. While that case was pending, acting as his own counsel, he filed a plea of immunity setting forth his appointment as an Honorary Consul to the Dominican Republic. The plea was sustained, the case was dismissed. Subsequently, the Portage City Court entered an order setting aside the dismissal and the petitioner was ultimately tried on both charges. He was found guilty of speeding and found not guilty of driving while under the influence.

The evidence was uncontroverted that the petitioner had been appointed an Honorary Consul in 1966. His application for an exequatur was denied by the State Department because he was an Officer of the Lake County Juvenile Court. His appointment had never been revoked by the Dominican Republic. He testified on his own behalf and stated that, when he declared himself to be a Consul of the Dominican Republic, he did not believe that statement was false, he believed that, in spite of the fact he had been denied accreditation, he still held the post as Consul.

REASONS FOR GRANTING THE WRIT

THE PERSONATION OF THE PETITIONER WAS NOT FALSE WITHIN THE MEANING OF 18 U.S.C. 915

The statute under which this petitioner was indicted, 18 U.S.C. 915, requires three essential elements to be proven:

1. False assumption or pretension to be a consular official duly accredited as such in the United States.

2. In such pretended character, the obtaining of a thing of value.

3. Intent to defraud. *Cortez* v. *U.S.* C.A. 5, (1964), 328 F.2d 51.

In construing this section, the Court of Appeals for the Fifth Circuit looked for guidance to cases under Sec. 912—False personation of an officer or employee of the United States, and held that the gist of the offense is the *false* pretense of Federal authority, citing *U.S.* v. *Barnow,* (1915) 239 U.S. 74, 36 S. Ct. 19, 60 L.Ed 155; *U.S.* v. *Lepowitch* (1943) 318 U.S. 702, 63 S. Ct. 914, 87 L.Ed. 1091.

In denying the motion for judgment of acquittal, the trial court held that it was not necessary for the Government to prove that the petitioner pretended to be duly accredited by the United States, but that since the proof showed that the petitioner was not accredited he could not be a consul and, therefore, his personation was false. With all due respect, it is submitted that the trial court erred in both observations.

The statute by express language requires that the personation condemned include the element that he be accredited by the United States. The fact that he had applied for an

exequatur which had been denied does not make or render the petitioner's personation false. The term exequatur from the Latin literally means:

"Let it be executed."

In international law, the term is defined as:

> "A certificate issued by the foreign department of a State to a consul or commercial agent of another State recognizing his official character and authorizing him to fulfil his duties." Black's Law Dictionary, 4th Ed. P. 682.

Thus, it is clear that the denial of the exequatur by the United States State Department did not render his status as a consul false, but only had the effect of denying him authority to fulfil his duties as a consul. The fact that he was not authorized by our State Department to *function* as a consul does not make his *personation* as a consul false.

In the proceedings in the Portage City Court he was not attempting to exercise any consular duties or functions, he was utilizing his *status* as a consul in an attempt to obtain immunity from prosecution. It is only in this aspect of the case that he made any false representations—he claimed immunity by virtue of his status as a consul when he knew he was not entitled to it.

Accreditation by the State Department would not have entitled him to immunity for two reasons:

(A) He was an American citizen.

(B) The charges which he faced were misdemeanors.

A long line of decisions have established conclusively that consuls of foreign countries are not entitled to immunity from suit and are not privileged from prosecution for a misdemeanor by virtue of the consular appointment. *U.S.* v. *Ravara,* (1793) 2 U.S. 297, 1 L. Ed. 388; *Auer* v.

Costa (1938) D.C. Mass. 23 F.Supp. 22; *Anderson* v. *Villela,* (1962) D.C. Mass. 210 F.Supp. 791. The lack of accreditation, therefore, neither diminished nor bolstered his plea of immunity from prosecution.

The statute under which this prosecution was initiated requires proof of specific intent, that is, that the petitioner knowingly and wilfully and intentionally represented and pretended to be a consul when there was no basis in fact for that representation or pretense. The gist of the statutory crime is the false pretense. In *U.S.* v. *McNaugh* (1930) CA 2, 42 F. 2d 835, the defendants were convicted of conspiring to falsely pretend to be United States Officers or employees. The judgment of conviction was reversed on appeal because the Government had never proved that the defendants were not, in fact, Government employees.

Similarly, in the case at bar, the Government has not proven that the petitioner was not a consul. All that the Government has proven is that the petitioner's application for an exequatur which would permit him to *function* as a consul had been denied.

In *Fotie* v. *U.S.* (1939) CA 8, 137 F.2d 831, the defendant was convicted of falsely personating an American citizen for the fraudulent purpose of voting in a general election. The evidence was in conflict as to whether he was born in Italy or the United States. The Court of Appeals reversed, holding that the burden was on the Government to prove that he was *not* a citizen and that his claim of citizenship was *knowingly* false.

In the prosecution in the Portage City Court the petitioner was not functioning or acting as a consul. He sought to persuade the Portage City Court by virtue of his *status* as a consul to grant him immunity, an immunity to which

he would not have been entitled even if he had been accredited by the State Department. It is clear, therefore, that there was no false personation; the petitioner represented that he was exactly what the proof showed him to be —an Honorary Consul by virtue of an appointment from the Dominican Republic which had never been revoked.

While his conduct in the Portage City Court in attempting to gain immunity by virtue of his status as a consul is professionally and morally reprehensible, that is not the type of conduct interdicted by this statute. As long as he honestly believed that he was a consul, irrespective of his lack of accreditation, there was no false personation involved.

In *Stahmann* v. *State* (1934) 126 Texas Cr. Rep. 192, 70 S.W.2d 709, the defendant was convicted on a charge of falsely pretending and assuming to be a police officer. The defendant had been appointed a deputy constable and he honestly believed that he was a peace officer authorized to make arrests. The fact was that he was not authorized to make arrests. The judgment of conviction, however, was reversed since the evidence was uncontroverted that he honestly believed that he was a police officer.

Again, in *Foute* v. *State,* (1925) 113 Ohio 450, 149 N.E. 551, the defendant was convicted of impersonating a police officer. The defendant was a member of an association which was incorporated to apprehend persons committing felonies, although he was not authorized to make arrests. In the course of the trial, the judge excluded evidence of the defendant's membership in the association. The judgment of conviction was reversed on appeal. The Supreme Court of Ohio held that where the statute includes the term false, it injects the element of good faith and the State is required to prove actual or constructive knowledge of the untruth of the representation.

The treaty which the trial judge relied upon was not entered into force with respect to the United States of America until December 24, 1969. The evidence is uncontradicted that the petitioner's appointment and application for exequatur occurred in 1967. It is clear, therefore, that this treaty which was not ratified by the Senate until 1969 and entered into force with respect to the United States in December of 1969, could have no bearing upon the denial of the exequatur to the petitioner in 1967. In any event, the treaty is inapplicable to the petitioner since it only purports to affect the right to *function* as a consul rather than the petitioner's *status* as a consul.

CONCLUSION

In denying the motion for judgment of acquittal the trial court held that it was not necessary for the Government to prove that the petitioner pretended to be duly accredited by the United States. In so doing, it is submitted that the trial judge judicially amended the statute by deleting the phrase

> . . . duly accredited as such . . ."

If, however, the trial judge is correct and this element is not necessary to be proven by the Government, then the judgment of conviction must fall because there has been no false assumption or pretension to be a consular official since the uncontroverted proof is that his appointment as a consul by the Dominican Republic was never revoked.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 21, 1973

Before

Hon. LEONARD P. MOORE, *Senior Circuit Judge**
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 72 1818 vs.

AUGUSTIN MARRERO DE IBERN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana. — 72 H CR 55
George N. Beamer, Chief Judge.

ORDER

Defendant-appellant Augustin Marrero De Ibern was charged in an indictment with falsely pretending to be a duly accredited diplomatic official of the Dominican Republic (namely, a Consul) and through this claimed status, with attempting to obtain immunity from prosecution for the offenses of driving under the influence of intoxicating liquor and speeding by stating, with intent to defraud, to a

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*Senior United States Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

Judge of the City Court, Portage, Indiana, that he was a Consul, in violation of 18 U.S.C. §915.[1]

A motion to dismiss the indictment on the ground that it did not state facts sufficient to constitute an offense against the United States was denied and the case proceeded to trial, upon waiver of a jury, before (now chief) Judge G. N. Beamer. Motions for acquittal at the close of the Government's case and at the close of the entire case were denied. A post-trial motion for acquittal was also denied. Judgment of conviction was entered, imposition of sentence was withheld, and appellant was placed on probation for two years. Appellant appeals from the judgment of conviction.

On December 23, 1971, appellant, a practicing attorney and an Assistant Juvenile Court Judge in Lake County, Indiana, was arrested for motor vehicle violations, i.e., speeding (80 m.p.h.) and driving under the influence of an intoxicating beverage. To these charges appellant, acting as his own attorney, filed a plea in which he claimed that he was entitled to immunity because "of his position as Consul for the Dominican Republic," having been appointed by the President of that Republic, which commission was still in effect. He sought dismissal of the misdemeanor charges against him on the basis of such plea which he signed as "Dominican Consul" and gave his Gary office address as "Banco Nacional de Gary." On December

[1] Section 915 of 18 U.S.C. provides:

§915. Foreign diplomats, consuls or officers.

Whoever, with intent to defraud within the United States, falsely assumes or pretends to be a diplomatic, consular or other official of a foreign government duly accredited as such to the United States and acts as such, or in such pretended character, demands or obtains or attempts to obtain any money, paper, document, or other thing of value, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

31, 1971, the Portage City Court sustained the plea and dismissed the charges. Subsequently, the court on its own motion found that the plea had been improperly granted and set aside the dismissal. Upon a subsequent trial appellant was convicted of speeding and acquitted of the drunken driving charge.

To the indictment charge of impersonating a diplomatic officer appellant interposed the defense that he did not knowingly, wilfully, falsely and intentionally pretend to be a Consul. He cites his appointment as an Honorary Consul of the Dominican Republic and minimizes our State Department's refusal to grant him recognition (an "exequatur") in this capacity. This denial of accreditation, he argues, only had the effect of preventing him from fulfilling his functions as a Consul and did not make his personation false. In so arguing appellant overlooks the fact, stressed by the trial judge in his opinion, that "[a] person who cannot perform the functions of a Consul is simply not a Consul."[2] Appellant knew that he had been denied accreditation; therefore, he was not a Consul although he held himself out to be such. Appellant's intent to defraud is further established from his own statement to inquiring F.B.I. agents, namely, that he knew that it was improper to claim immunity but that he wished to use any method to get himself out of being convicted for the motor vehicle violations.

As to the claim that appellant did not receive a "thing of value" as required to establish a violation of 18 U.S.C. §915, it suffices to say that appellant's reputation as an attorney and as a judicial official, if kept unblemished, obviously had great value as may be gleaned from his strenuous though questionable means to preserve it.

The judgment of conviction is affirmed.

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[2]Memorandum Opinion dated June 30, 1972, at 1.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

UNITED STATES OF AMERICA,

vs.

AGUSTIN MARRERO DE IBERN

Criminal No. 72 H Cr 55

ORDER

The defendant has filed a post-trial motion for judgment of acquittal or in the alternative for a new trial.

The motion is DENIED.

/s/ *George N. Beamer*
U. S. District Judge

Enter: June 30, 1972

MEMORANDUM

Defendant, in his motion, asserts two main issues, (1) there was no claim or assertion by the defendant that he had been duly accredited as a Consul for the Dominican Republic by the United States; and (2) there was no evidence of a specific intent to obtain something of value by falsely pretending to be a Consul for the Dominican Republic.

Defendant asserts that because he had a letter or certificate of appointment from the President of the Dominican Republic he was nevertheless a Consul, but because he

was not accredited he could not perform the functions of a Consul. A person who cannot perform the functions of a Consul is simply not a Consul. The situation is analogous to a person claiming to be a federal judge because he had been designated as such by the President but rejected by the Senate. He simply is not a federal judge and any pretension that he was would be false because any claim that he was would carry with it the necessary implication that he had been appointed by the President and confirmed by the Senate without his expressly saying so.

The Court recognizes that this is a specific intent case. In determining specific intent, the appointment by the President of the Dominican Republic becomes important. If the defendant believed that this appointment authorized him to claim the status of a Consul with accreditation by the U. S., then the element of specific intent would be missing. However, the evidence here clearly shows that he had no such misconception.

First of all, the defendant is a lawyer who presumably knows the necessary requirements to become a Consul for a foreign government. We need not rely on this presumption here, however, because the uncontroverted testimony of Agent Whitaker clearly shows that he did know the requirements. Agent Whitaker testified as follows concerning his interview with the defendant:

> Q. Relative to your investigation what did he tell you?
>
> A. He told me he had been appointed by the President of the Dominican Republic as an Honorary Consul and because at the time of the appointment he was acting as an officer of the Lake County Court that his recognition was denied by the State Department.

Q. Did you ask him about his plea of immunity in December, 1971?

A. Yes. He stated he knew it was improper to claim immunity legally; however, that he felt he was using any method available to get out of being convicted.

This testimony clearly establishes that the defendant knew that he was not authorized to act as Consul and that he falsely asserted that he was to avoid prosecution. This certainly establishes a specific intent to falsely personate a status that he did not have for the purpose of obtaining a thing of value, namely immunity from prosecution.

For the foregoing reasons, defendant's motion must be denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

June 11, 1973

Before

Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LEONARD P. MOORE, SR. *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 72-1818 vs.

AGUSTIN MARRERO DeIBERN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
(72 H CR 55)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.